

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: October 25, 2021]

**RHODE ISLAND BOARD OF REGENTS/
DEPARTMENT OF EDUCATION,**
Plaintiff,

vs.

**RHODE ISLAND STATE LABOR
RELATIONS BOARD by and through its
Chairman, WALTER J. LANNI, and its
Members, MARCIA B. REBACK,
SCOTT G. DUHAMEL, ARONDA R. KIRBY,
HARRY F. WINTHROP, ALBERTO APONTE
CARDONA, and FRANK J. MONTANARO,
and RIDE LEGAL COUNSEL/HEARING
OFFICER PROFESSIONAL UNION,**
Defendants.

C.A. No. PC-2015-5683

Consolidated With

**RHODE ISLAND BOARD OF REGENTS/
DEPARTMENT OF EDUCATION,**
Plaintiff,

vs.

**RHODE ISLAND STATE LABOR
RELATIONS BOARD by and through its
Chairman, WALTER J. LANNI, and its
Members, MARCIA B. REBACK,
GERALD S. GOLDSTEIN, ELIZABETH S.
DOLAN, BRUCE A. WOLPERT, FRANK J.
MONTANARO, and SCOTT G. DUHAMEL;
and RIDE LEGAL COUNSEL/HEARING
OFFICER PROFESSIONAL UNION,**
Defendants.

C.A. No. PC-2014-2730

DECISION

MCGUIRL, J. Rhode Island Board of Regents/Department of Education (RIDE or Plaintiff) seeks judicial review and reversal of two decisions. The first decision was issued on April 30, 2014 (Decision) and the second Supplemental Decision on Remand was issued on December 2, 2015 (Supplemental Decision). These decisions were issued by the Rhode Island State Labor Relations Board (Board) in the matter of Rhode Island Board of Regents/Department of Education and RIDE Legal Counsel/Hearing Officer Professional Union (Case. No. ULP No. EE-3729). This Court exercises jurisdiction over this matter pursuant to G.L. 1956 § 42-35-15(g) and G.L. 1956 § 28-7-29(a).¹ For the reasons set forth herein, this matter is REMANDED to the Board so that it may consider whether the current status of the Department’s attorneys now warrant this Court’s exercise of authority in this matter.

I

Facts and Travel

On November 9, 2012, Attorney Paul Pontarelli (Pontarelli) filed a petition on behalf of the Legal Counsel/Hearing Officers employed by RIDE seeking certification as the RIDE Legal

¹ Section 28-7-29(a) provides that

“[a]ny person aggrieved by a final decision of the board, or a final order of the board, granting or denying in whole or in part the relief sought may obtain a review of the final decision or final order in the superior court of the county where the unfair labor practice in question was alleged to have been engaged in or where the person resides or transacts business, by filing in the superior court, within thirty (30) days after the final decision or final order is given by the board, a complaint requesting that the final decision or final order of the board be modified or set aside. If that court is on vacation or in recess, then the person may file to the superior court of any county adjoining the county where the unfair labor practice in question occurred or where the person resides or transacts business.”

Counsel/Hearing Officer Professional Union (Union). (Compl. ¶ 9.) RIDE objected to the petition on the grounds that each Legal Counsel/Hearing Officer was in a confidential position and, therefore, ineligible to participate in a collective bargaining unit. *Id.* ¶ 10.

A

Hearings Before the Board

The Board held an informal hearing on the petition on December 12, 2012. *Id.* ¶ 22. The Board then conducted formal hearings on May 9, 2013 and June 20, 2013. *Id.* ¶ 23. At the hearings, the Board took testimony from Margaret Santiago, RIDE's Human Resources Manager; former Legal Counsel/Hearing Officers Paul Pontarelli and Kathleen Murray; and George Muksian, RIDE's former Chief Legal Counsel. *See* (Hr'g Tr. 05/09/13 and 06/20/13). Each of the individuals testified as to the duties and responsibilities of the Legal Counsel/Hearing Officer position and whether the position should be excluded from participation in collective bargaining as confidential employees. *See generally id.* RIDE and the Union submitted post-hearing briefs to the Board on September 4, 2013. (Compl. ¶ 24.)

B

The Board's Decisions

1

The 2014 Decision

On April 30, 2014, the Board reviewed and adopted the Decision and Direction of Election. *Id.* ¶ 25. The Decision ordered that a representation election be held among all Legal Counsel/Hearing Officers employed by RIDE on November 9, 2012. *Id.* In its decision, the Board found that the Legal Counsel/Hearing Officer position did not qualify as a confidential position under the labor-nexus test and therefore was not excluded from collective bargaining. (Decision at

15.) The Board directed that a secret ballot be conducted to determine whether the employees wished to be represented by the RIDE Legal Counsel/Hearing Officer Professional Union. At the election, the two employees determined by the Board as eligible to vote, Pontarelli and Kathleen Murray (Murray), chose the RIDE Legal Counsel/Hearing Officer Professional Union as their bargaining representative. (Compl. ¶ 30.) On May 28, 2014, the Board certified the RIDE Legal Counsel/Hearing Officer Professional Union as the exclusive representative for the bargaining unit. *Id.* ¶ 31.

On May 30, 2014, RIDE filed an appeal of the 2014 Decision (C.A. No. 14-2730). (Compl. ¶ 32.) RIDE alleged that the employees covered by the Decision should have included attorneys/hearing officers who were employed by the Rhode Island Office of Higher Education at the time of the Board's Decision who were still employed at the time of the election, specifically, Anne Marie Coleman (Coleman) as well as all Legal Counsel/Hearing Officers employed by RIDE at the time of the Board's Decision who were still employed at the time of the election, specifically, Pontarelli, Murray and Anthony Cottone (Cottone). *Id.* ¶¶ 27, 29.

On July 8, 2014, RIDE filed a Motion for a Stay of the Board's Decision and Order Pending Appeal. *See* RIDE'S Mot. for Stay; Compl. ¶ 33. On September 4, 2014, the Court issued a Consent Order in which the Defendants agreed to a stay pending Plaintiff's appeal and Plaintiffs agreed to treat the three members of the petitioned for bargaining unit as it treated its non-union, non-classified employees. *See* Order (Sept. 4, 2014) (Procaccini, J.). On January 23, 2015, Cottone, individually and as Legal Counsel/Hearing Officer for RIDE, filed a motion to intervene and stay the Decision and to remand the case to the Board to consider new evidence. Mot. to Intervene and Mot. to Remand.

On February 5, 2015, the Court issued a second Order, which granted the Motion to Intervene and passed on the Motion to Remand. *See* Order Granting the Motion to Intervene and Passing the Motion to Remand, Feb. 5, 2015 (Licht, J.). On June 12, 2015, the Court then issued an Order granting RIDE’s Motion to Remand and ordering the Board to “reconsider whether the Legal Counsel/Hearing Officer position . . . should have been deemed managerial, and thus exempt from collective bargaining, at the time the Union’s petition was filed with the [Board] . . . and . . . determine . . . if the parties should be permitted to introduce additional evidence on the issue . . . and . . . if so, what additional evidence should be admitted.” Order Granting the Motion to Remand (June 12, 2015) (Van Couyghen, J.).

2

The Board’s 2015 Supplemental Decision

On December 2, 2015, the Board issued its Supplemental Decision, which determined that no additional evidence should be admitted and that the position of Legal Counsel/Hearing Officer is not managerial. (Compl. ¶ 37.) The Board concluded that the testimony from the formal hearings previously held was sufficiently thorough and the record was adequate for the Board to determine whether the Legal Counsel/Hearing Officers were excludable from collective bargaining, at the time of the filing of the petition, as managerial. (Supplemental Decision at 2.) The Board determined that it would not reopen the record for additional testimony or documentary evidence on this issue. *Id.*

However, the Board did agree to consider and incorporate by reference all of the parties’ written arguments filed in the Superior Court proceedings to date and to take judicial notice of the decision stated by RIDE, *Am. Fed’n of State v. Ill. Labor Rels. Bd.*, No. 1-12-3426, 2014 Ill. App. LEXIS 587 (App. Ct. Ill, 1st Dist. August 13, 2014), which it distinguished on the basis of its

factual dissimilarity to the instant matter, stating that the duties and responsibilities of the RIDE Legal Counsel/Hearing Officers were not in essence managerial. *Id.* The Board concluded that the position of Legal Counsel/Hearing Officer was not managerial and could not be excluded from collective bargaining on that basis. *Id.* at 7.

After the Board issued its 2015 Supplemental Decision, RIDE again sought judicial review and reversal of the Board's decision. (Compl. ¶¶ 49-52); (Mot. To Remand at 4-7, Mar. 31, 2016.) Additionally, RIDE filed a second Motion to Remand seeking to submit new evidence regarding changes at RIDE since the original petition was filed. *Id.* RIDE also seeks remand so that it may submit additional evidence in support of its contention that the Legal Counsel/Hearing Officers are managerial employees. *Id.* As a general matter, this Court will not allow the presentation of evidence subsequent to the initial hearings conducted by the Board. *See Telemundo de Puerto Rico, Inc. v. N.L.R.B.*, 113 F.3d 270, 276 (1st Cir. 1997) (holding that an employer is unable to relitigate issues which could have been contested in the underlying representation proceeding.)

Since Pontarelli filed this petition in 2012, the three individuals occupying the position of Legal Counsel/Hearing Officer in 2012, Pontarelli, Murray, and Avila, no longer work for RIDE.² *See* Margaret Santiago Aff. Ex. A, Oct. 1, 2021. Attorney Cottone now occupies the position of Chief Legal Counsel. *See* Pl.'s Mem. Ex. A, Nov. 2, 2020. Additionally, current Legal Counsel/Hearing Officer Julie Sacks has stated in an affidavit, Plaintiff's Exhibit C, that she does not wish to join a union, and RIDE has made representations that the two additional individuals

² At the time of the hearings, Attorney Forrest Avila (Avila) was working as a Legal Counsel/Hearing Officer but it was understood that he would be retiring shortly after the hearings. *See* Supplemental Decision at 2. Cottone was hired shortly after Avila retired as a Legal Counsel/Hearing Officer. Compl. ¶ 35.

currently employed as Legal Counsel/Hearing Officers also do not wish to join a union. *See* Pl.’s Mem. Ex. C, Nov. 2, 2020.

II

Standard of Review

The Superior Court’s review of an administrative decision is governed by § 42-35-15 of the APA. *Rossi v. Employees’ Retirement System*, 895 A.2d 106, 109 (R.I. 2006); *Arnold v. Rhode Island Department of Labor and Training Board of Review*, 822 A.2d 164, 166 (R.I. 2003).

Section 42-35-15(g) provides that:

“[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;

“(2) In excess of the statutory authority of the agency;

“(3) Made upon unlawful procedure;

“(4) Affected by other error of law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

The Superior Court’s review of an administrative decision is limited to a determination of whether or not legally competent evidence exists in the record to support the agency’s decision.

Johnston Ambulatory Surgical Associates, Ltd. v. Nolan, 755 A.2d 799, 804-05 (R.I. 2000).

Legally competent evidence (sometimes referred to as “substantial evidence”) has been defined as “relevant evidence that a reasonable mind might accept as adequate to support a conclusion[; it] means an amount more than a scintilla but less than a preponderance.” *Center for Behavioral*

Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 684 (R.I. 1998) (internal quotation marks omitted); *see also Arnold*, 822 A.2d at 167; *Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review*, 749 A.2d 1121, 1125 (R.I. 2000).

This Court is not to substitute its judgment on questions of fact for that of the agency whose actions are under review. *Lemoine v. Department of Mental Health, Retardation and Hospitals*, 113 R.I. 285, 291, 320 A.2d 611, 614-15 (1974). This is so even in situations in which the court, after examining the certified record, might be inclined to view the evidence differently and draw different inferences from those of the agency below. *Cahoone v. Board of Review of Department of Employment Security*, 104 R.I. 503, 506, 246 A.2d 213, 214-15 (1968). If competent evidence exists in the record considered as a whole, this Court is required to uphold the agency's conclusions. *Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1138 (R.I. 1992).

“Questions of law, however, are not binding upon the court and may be reviewed to determine what the law is and its applicability to the facts.” *Narragansett Wire Co. v. Norberg*, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977).

III

Analysis

As noted previously, this case has remained pending for several years, and the Court has strong interest in its resolution. However, none of the original Legal Counsel/Hearing Officers who voted for certification at the time of the Board's 2014 Decision still work at RIDE. In addition, there was some representation by counsel that none of the individuals currently holding this position may favor joining a union. These facts lead the Court to question the current status of the

Department's Legal Counsel/Hearing Officers, and whether a decision is appropriate in the instant case.

The Rhode Island Supreme Court has not addressed this issue in its decisions. However, the Rhode Island Supreme Court has stated that “we have consistently looked to federal law for guidance in the field of labor law.” *See DiGuilio v. Rhode Island Brotherhood of Correctional Officers*, 819 A.2d 1271, 1273 (R.I. 2003) (citing *MacQuattie v. Malafronte*, 779 A.2d 633, 636 n.3 (R.I. 2001) (per curiam); *Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board*, 694 A.2d 1185, 1189 (R.I. 1997)); *see also Belanger v. Matteson*, 115 R.I. 332, 337-38, 346 A.2d 124, 129 (1975), *cert. denied*, 424 U.S. 968 (1976) (noting Rhode Island often looks to federal courts for guidance when state courts are silent on an issue, particularly matters involving labor disputes). Regarding the enforceability of a labor board's order, the First Circuit stated that “if the passage of time leads to changed circumstances rendering enforcement of the Board's order unfair, unnecessary, or otherwise inappropriate, we will decline to enforce an order of the Board.” *N.L.R.B. v. International Brotherhood of Teamsters, Local 251*, 691 F.3d 49, 61 (1st Cir. 2012); *see also N.L.R.B. v. LaVerdiere's Enterprises*, 933 F.2d 1045, 1054-55 (1st Cir. 1991); *Emhart Industries, Hartford Division v. N.L.R.B.*, 907 F.2d 372, 379 (2d Cir. 1990) (“[W]e must withhold enforcement of orders that will not effectuate any reasonable policy of the act, even where the problems with the order are caused primarily by the lapse of time.”).

Here, none of the Legal Counsel/Hearing Officers originally affected by the Board's order currently work at RIDE. Additionally, there is some question raised that a decision from this Court may be unconnected to the present interests of the Legal Counsel/Hearing Officers currently employed by RIDE. While this Court is prepared to issue a decision on the merits regarding the

Board’s 2014 Decision and 2015 Supplemental Decision, this issue does not appear ripe for adjudication, as there are outstanding concerns regarding the status of the parties.³ *See McInnis-Misenor v. Maine Medical Center*, 319 F.3d 63, 70 (1st Cir. 2003) (discussing the desire for courts to refrain from ““entangling themselves in abstract disagreements.””) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). Before the Court can render a decision, the Board should clarify whether the current status of Legal Counsel/Hearing Officers, in light of the changed circumstances, would render enforcement of the Board’s order “unfair, unnecessary, or otherwise inappropriate.” *International Brotherhood of Teamsters, Local 251*, 691 F.3d at 61. On remand, the Board shall consider whether the changed circumstances in this case warrant a decision regarding the Board’s previous orders or if the passage of time and related employee turnover no longer justifies this outcome, making a decision inappropriate at this time.

IV

Conclusion

This matter is remanded for a determination consistent with this Decision, and for further hearing if necessary. Counsel shall submit the appropriate order for entry.

³ The Court has received two further memos regarding an additional individual that may or may not have worked as a Legal Counsel/Hearing Officer at RIDE. *See* Def. Union’s Mot. to Correct Record at 1, Oct. 8, 2021. These filings are an example of the confusion as to the identity and status of the parties and further exemplifies the need for the Board to investigate the current status of the Legal Counsel/Hearing Officers.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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COURT: Providence County Superior Court

DATE DECISION FILED: October 25, 2021

JUSTICE/MAGISTRATE: McGuirl, J.

ATTORNEYS:

For Plaintiff: Joseph D. Whelan, Esq.; Matthew H. Parker, Esq.

For Defendant: Jeffrey W. Kasle, Esq.



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ATTORNEYS:

For Plaintiff: Joseph D. Whelan, Esq.; Matthew H. Parker, Esq.

For Defendant: Paul E. Pontarelli, Esq.
Anthony F. Cottone, Esq. (*Intervenor*)